

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH DALE ARMSTRONG,

Plaintiff,

v.

OPINION AND ORDER

12-cv-426-bbc

JOHN I. NORSETTER, former Dane
County District Attorney; John Doe #1,
Dane County WI prosecutor; MARION
MORGAN, Madison Police Department
Detective; ROBERT LOMBARDO,
Madison Police Department Detective;
JOHN DOE #2, Madison WI Police
Officer; KAREN D. DAILY, Wisconsin
Crime Lab Analyst; DANIEL J. CAMPBELL,
Wisconsin Crime Lab Analyst; JANE DOE
#3, Wisconsin Crime Lab Analyst; VICKI
GILBERTSON, Dane County Clerk of
Circuit Courts Supervisor; JANE DOE #4,
Dane County Clerk of Circuit Court
Assistant,

Defendants.

Plaintiff Ralph Dale Armstrong brought this civil suit for money damages against
defendant State of Wisconsin on June 15, 2012, contending that his constitutional right to
due process had been violated by state and municipal employees, who engaged in witness
and evidence tampering in their successful effort to convict him of a murder he did not
commit. In an order entered on September 26, 2012, I dismissed the suit because defendant

had named only one defendant, the State of Wisconsin, and it is not a suable entity.

It seemed clear that plaintiff Armstrong wanted to sue the particular persons who had allegedly violated his rights so I gave him until October 26, 2012 in which to file an amended complaint, naming the persons he wanted to sue. Armstrong filed his amended complaint on October 22, 2012, deleting the state as a defendant and naming ten new defendants. He has also filed a motion for the appointment of counsel.

After reviewing Armstrong's complaint, I conclude that he cannot proceed on any of the six claims he has asserted, for various reasons, including claim preclusion, witness and prosecutorial immunity and his failure to allege facts that state a claim. His motion for appointment of counsel will be denied as moot.

In his proposed amended complaint, Armstrong has alleged the following facts.

BACKGROUND

Ralph Armstrong was convicted on March 24, 1981, of the assault and murder of Charise Kamps and incarcerated for more than 29 years. On his appeal of his conviction, he contested many aspects of his prosecution, including the state's use of hypnosis to enhance the memory of an eyewitness, an improper lineup that led to his identification and the prosecution's failure to turn over to the defense a parking ticket bearing on Armstrong's alibi. The Wisconsin Supreme Court affirmed his conviction, holding that it had been proper to use hypnosis, that the lineup was permissible and that the prosecution had not violated any duty to Armstrong when it failed to turn over the parking ticket because

Armstrong had equivalent access to the evidence: he knew he had been ticketed and he had his canceled check as evidence that he had paid the ticket. State v. Armstrong, 110 Wis. 2d 555, 574, 575& 580, 329 N.W.2d 386 (1983). Armstrong filed at least two post conviction motions thereafter: a petition for a writ of habeas corpus in federal court and a motion in state court for a new trial based on newly discovered evidence in 1991. On May 17, 2001, he filed another motion for a new trial based on the following newly discovered evidence: DNA testing excluding him and Kamps's boyfriend as being the source of two hairs found on the scene; a report by an examiner that he had found no traces of blood when examining a cloth accompanying slides allegedly prepared from hemostick swabs and scrapings from Armstrong's thumbs and large toes; and a 1990 DNA analysis that showed he was not the source of semen found on Kamps's bathrobe. This evidence led the state supreme court to find Armstrong entitled to a new trial "in the interest of justice because the real controversy was never tried." State v. Armstrong, 2005 WI 119, ¶¶ 1, 163, 283 Wis. 2d 639, 699, 700 N.W.2d 98, 131 (2005). The case was set for a new trial in the Circuit Court for Dane County, Wisconsin. On August 26, 2009, the court dismissed Armstrong's conviction. According to Armstrong, the dismissal was based on the court's finding that the prosecution had engaged in misconduct. (It does not appear that the dismissal order was published or that it is available electronically.)

Armstrong alleges that defendants engaged in the following misconduct. (He listed nine separate claims of misconduct in his proposed amended complaint, but two of them overlap and one is not a claim about misconduct but Armstrong's assertion that defendant

Norsetter does not have prosecutorial immunity for his failure to advise Armstrong about the new confession.)

ALLEGATIONS OF FACT

1. Defendant John Doe #2 (various unidentified Madison police officers) took evidence, including drugs and drug paraphernalia, from the crime scene immediately after the discovery of Kamps's body, threw it all together into a plastic trash bag and took it to the police department, where it was immediately incinerated. Later, a Madison police officer signed a report to the effect that the evidence had not been incinerated but merely moved.

2. Defendants Detective Robert Lombardo, Assistant Dane County District Attorney John Norsetter and another John Doe #2 Madison police officer conducted an unreliable hypnosis session with the one witness who claimed to have seen a male enter and leave the victim's apartment building several times on the night of the murder. Although the witness had described the male as shirtless, about 5' 5" to 5 '6" tall, about 165 pounds, wearing a moustache and without tattoos, when the police ordered a lineup at the scene, the witness selected Armstrong as the person entering the building that night. At the time, Armstrong was 6' 2" tall, weighed about 200 pounds, had no mustache and noticeable tattoos on both arms.

3. Defendants Norsetter, Lombardo and another John Doe #2 suppressed and withheld from Armstrong's counsel a parking ticket that would have supported his alibi for his whereabouts at the time of the murder.

4. Jane Doe #3, an unknown Wisconsin Crime Lab analyst, testified falsely that she and other analysts used reliable procedures in determining that Armstrong was the probable source of the semen, hair, blood and saliva obtained from the murder site.

5. Defendants Norsetter and John Doe #1 (an unknown prosecutor) chose to re-try Armstrong despite the state supreme court's reversal of his convictions. Before the trial could take place, Armstrong's counsel and defendants Norsetter and John Doe #1 signed a stipulation intended to safeguard the evidence. All of the defendants (other than defendant Lombardo) violated the stipulation. Among other allegedly improper acts, defendants' removal and additional testing of a newly discovered semen stain, which resulted in the destruction of the potentially exculpatory stain.

6. Defendants Norsetter and John Doe #1 were informed in 1994 that a person had confessed to Kamps's murder and kept the information to themselves. Defendant Norsetter admitted under oath at a hearing in state court that he had received the information about the confession in 1994 and had suppressed it.

OPINION

Armstrong's proposed amended complaint addresses the problems identified in the September 26, 2012 order dismissing his first complaint. Therefore, the amended complaint is ready for screening. I will take up each his claims of misconduct in order, as renumbered.

A. Claims in Complaint

1. Destruction of evidence by police officers

To prove that the mishandling of crime scene evidence amounted to a violation of his constitutional rights, Armstrong would have to show that the items in the trash bag had the potential to exculpate him and that the officers acted in bad faith and not just negligently when they mishandled the items. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988) (refusing to impose upon police “an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance” and holding that there is no denial of due process unless police acted in bad faith); Hubanks v. Frank, 392 F.3d 926, 930 (7th Cir. 2004) (finding no denial of due process when exhibits from defendant’s criminal trial were destroyed pursuant to police department policy while his appeal was pending).

Armstrong has not alleged anything to suggest that the materials had the potential to exculpate him and that, if they did, the police had any reason to think so. According to his allegations, the police removed the items shortly after discovering the body at a time when they would have had no reason to suppress evidence. In fact, their incentive at the time would have been the opposite: to preserve every piece of evidence that might shed light on the identity, motive and method of the murderer. In any event, Armstrong has alleged nothing that would suggest that the police acted in bad faith; at most they were negligent, in which case they could not be held to have violated his right to due process. Id. at 58.

2. Unreliable hypnosis session and lineup

In 1983, the Wisconsin Supreme Court considered Armstrong's claim that the state's use of hypnosis to enhance a witness's memory made the witness's subsequent identification of Armstrong inadmissible. It concluded that it did not. State v. Armstrong, 110 Wis. 2d 555, 574-75, 329 N.W.2d 386, 396 (1983). It found also that the lineup identification of Armstrong was not impermissibly suggestive. Id. at 576-78, 329 N.W.2d at 397-98. (According to the court, the "lineup" consisted of having each participant handcuffed and led across the street near where the witness had seen a man on the morning in question. Id. at 563, 329 N.W.2d at 391.)

These rulings bar Armstrong from re-arguing his claim that defendants Lombardo, Norsetter and a John Doe #2 police officer violated his right to due process when they had a witness hypnotized to refresh the witness's memory and when they conducted a lineup at the murder scene. Allen v. McCurry, 449 U.S. 90, 96 (1980) (res judicata principles apply to civil rights suits brought under § 1983). It does not matter that the state supreme court hearing was part of the criminal proceedings against him and he is proceeding in this court in a civil action. Id. at 97. Unless Armstrong could show that he did not have a full and fair opportunity to litigate this claim before the Wisconsin Supreme Court, he cannot proceed on this claim. He has alleged nothing to suggest that he could make such a showing.

3. Suppression of parking ticket

As it did with Armstrong's second claim relating to the use of hypnosis and the lineup,

the state supreme court rejected his claim that the police and prosecutors had breached their duty to disclose exculpatory evidence to him when they failed to provide him an accurate copy of a parking ticket that he had received sometime around the time that Kamps was murdered. Armstrong believed that the parking ticket supported his alibi and that he should have been provided a copy of the ticket. The supreme court disagreed, holding that the state's duty to disclose extended only to evidence that is in its exclusive possession, Armstrong, 110 Wis. 2d at 580, 329 N.W.2d at 398, and that Armstrong had sufficient evidence of the parking ticket was in his own possession. "The defendant knew he had been ticketed. He paid the ticket by check and the cancelled check was returned to him." Id.

Under Allen v. McCurry, 449 U.S. 90, the state supreme court's decision has preclusive effect on the claim. Armstrong raised the issue in the state court and he does not allege that he had no chance to litigate it fully, so he cannot raise it again in this court.

4. False testimony of laboratory analysts

Armstrong alleges that various analysts employed by the Wisconsin Crime Lab performed tests on hair, blood, saliva and semen and on various items taken from the crime scene and created a number of false reports about which they testified at pre-trial hearings and at the trial itself. He cannot proceed on this theory. First, the analysts cannot be sued for their testimony. As witnesses in a judicial proceeding, they are entitled to absolute immunity from § 1983 suits for their courtroom testimony. Briscoe v. LaHue, 460 U.S. 325 (1983) (holding that § 1983 does not authorize suit against police officer or other

governmental employee for allegedly perjured testimony at trial).

When a police officer appears as a witness, he may reasonably be viewed as acting like any other witness sworn to tell the truth—in which event he can make a strong claim to witness immunity; alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits.

Id. at 335-36. The Court added that its holding applied even if the plaintiff in the § 1983 case had been vindicated in another forum, either on appeal or on collateral attack. Id. at 344.

Second, Armstrong cannot proceed against the analysts for their allegedly false reports and inaccurate tests, not because they have immunity for these matters, but because he has alleged nothing to suggest that they knowingly produced false or inaccurate reports or that they concealed the existence of exculpatory evidence intentionally and not through mere inadvertence or negligence. Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988) (upholding jury verdict against crime lab technician found to have processed evidence improperly in effort to convict plaintiff). Armstrong paints with a wide brush, accusing the analysts of creating “a number of false results and reports,” Cpt., dkt. #17, at 5, but he does not specify what might have been false about any particular result or report. He also alleges that 17 years later, the original reports on the nail swabs were proven to be wrong, id., and the purported “blood” on the nail swabs was shown to be non-existent, but he does not allege that any technician deliberately falsified any reports. At most the allegations might support a finding of negligence.

5. Violation of stipulation on evidence

Armstrong alleges that in connection with his retrial in 2005, his counsel entered into a stipulation with defendants Norsetter and John Doe #1 that was intended to set out protocols for the handling, movement and testing of any kind of physical evidence in the court's custody. Defendants Karen D. Daily, Wisconsin Crime Lab analyst, and Jane Doe #3, police officer Marion Morgan, John Doe #2, Vicki Gilbertson, Dane County Clerk of Circuit Courts Supervisor, and Jane Doe #4 repeatedly gained access to the evidence, opened and examined multiple items in non-sterile and unsecured locations and effectively destroyed one item in particular, a newly identified semen stain recovered from the probable murder weapon.

The problem with this claim is that Armstrong has not alleged that he was injured as a result of these allegedly improper actions. As he concedes, the outcome of the retrial was a dismissal of all of the charges on the ground of prosecutorial misconduct. A cause of action in tort does not arise unless an injury has occurred, Hydrite Chemical Co. v. Calumet Lubricants Co., 47 F.3d 887, 890 (7th Cir. 1995) (tort liability requires proof that there has been an injury), and a § 1983 claim is a tort claim, albeit one requiring a showing that a constitutional right has been violated. Buckley v. Fitzsimmons, 20 F.3d 789, 796 (7th Cir. 1994) ("There is no constitutional tort without injury.") Armstrong has not identified any injury that he incurred as a result of defendants' mishandling of the evidence in connection with his retrial. Therefore, he has failed to state a claim on which relief could be granted.

6. Defendants' knowledge of new confession

Armstrong's last claim is that in 1994, many years after his conviction became final, and at least 11 years before his retrial was even a possibility, defendants Norsetter and unknown prosecutor John Doe #1 learned that someone other than Armstrong had confessed to the murder of Charise Kamps but never told Armstrong about their discovery. With no prosecution pending, neither Norsetter nor the unknown prosecutor had any duty to Armstrong to turn over the information. The Court of Appeals for the Seventh Circuit has held that a prosecutor's obligation under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), is "functionally prosecutorial" and that "a Brady violation is not committed unless and until a prosecutor, in the course of preparing for or conducting a trial or direct appeal, does not turn over the material evidence in question." Fields v. Wharrie, 672 F.3d 505, 512-13 (7th Cir. 2012). The prosecutor's Brady and Giglio duties persist until a defendant's conviction becomes final, that is, when the defendant has exhausted the direct appeals afforded him, id. at 514-15, but not beyond that.

Armstrong does not assert that he had any direct appeals from his conviction pending in 1994, when defendants Norsetter and John Doe #1 allegedly suppressed the new confession. Therefore, under Fields, defendants had no duty under either Brady or Giglio to turn over to Armstrong whatever they had learned about a new confession. If, however, these defendants were still working as assistant district attorneys when the office was preparing for Armstrong's retrial, it is likely that they had a duty to disclose this information

to Armstrong, even if they had no duty to do so in the intervening years between their discovery and the remand of his case.

B. Motion for Appointment of Counsel

Because Armstrong is being denied leave to proceed on all of his claims, his motion for appointment of counsel will be denied as moot at this time. If he can amend his complaint sufficiently to state a claim on which relief may be granted, I will take the motion up again.

ORDER

IT IS ORDERED that

1. Plaintiff Ralph Dale Armstrong is DENIED leave to proceed for his failure to state a claim on which relief may be granted on his claim that defendants John I. Norsetter, John Doe #1, Marion Morgan, Robert Lombardo, John Doe #2, Karen D. Daily, Daniel J. Campbell, Jane Doe #3, Vicki Gilbertson and Jane Doe #4 violated his right to due process when they engaged in acts of misconduct in connection with the investigation and prosecution of murder and assault charges against him.
2. Plaintiff may have until January 4, 2013, in which to amend his complaint to state a claim.

3. Plaintiff's motion for appointment of counsel, dkt. #6, is DENIED as moot.

Entered this 11th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge